

15th October, 1767.

ANSWERS

FOR

JOHN MONTGOMERY Surgeon in Liverpool;

TO THE



PETITION of JOHN M'CARTNEY of Halket-leaths and others, Trustees appointed by Nathaniel Duke of Leaths.

THE question brought under your Lordships review by the petition now to be answered, reclaiming against the Lord Ordinary's interlocutors therein fairly recited, resolves into this abstract point, Whether a bankrupt, by executing a disposition in favours of certain trustees of his own chusing, for behoof of his whole creditors, can oblige the creditors to accept of such disposition, and tie up their hands from proceeding to operate their payment by course of legal diligence?

However variable the decisions upon this point were, during a certain period, it received a most solemn decision in the case of Snee and Company against Trustees of Michael Anderson, 12th July 1734; and in the case of the Earl of Aberdeen against Trustees for the creditors of Blair, 3d February 1736; and last of all, in the case of Forbes and others, the trustees of Mowat and Company: And, if the

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respondent is rightly informed, the rule so established has been uniformly followed in every after-case where the like question occurred. In the Law-dictionary, vol. i. p. 85. where the two first of the above mentioned cases are stated, the learned collector observes, " That the Lords laid hold " of that opportunity to declare their sentiments against all " such dispositions in general; and in that view caused insert the following clause in their interlocutor: *And further find, That no disposition by a bankrupt-debtor can disable " creditors from doing diligence."*

That Nathaniel Duke, at the time of executing the trust-disposition, which is now the subject of question, was utterly bankrupt and insolvent, is a fact too notorious to be disputed, as his whole effects, heritable and moveable, when turned into money, fall considerably short of paying one half of the debts he justly owes; tho' he had the address to conceal from his creditors these his bankrupt circumstances, till he gave way all at once, and to the very eve of his bankruptcy went on contracting new debts.

But whatever arguments might be pleaded for supporting such general dispositions by bankrupt and insolvent persons, when granted to the whole creditors themselves, or to trustees appointed by them, it is manifestly against every principle of law, justice, or common sense, that one in these bankrupt circumstances, after doing all in his power to defraud his creditors, by contracting debts so far above his funds as he must have known himself unable to pay, should have it in his power to appoint trustees of his own choosing, and to commit to them the management and disposal of his estate, or to oblige the creditors to accept thereof, and to risk their security and payment, so far as the funds will go, upon the fidelity and diligence of those trustees. And this is precisely the case in hand; as supposing such trust-dispositions could in other respects be supported, the exceptions which lie to this particular trust-disposition are such, that
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neither the creditors in general, nor any one particular creditor, were all the rest ever so willing to accept thereof, could be thereby bound.

It is insinuated in the petition, that the respondent, and a few others of the most inconsiderable creditors, are the only persons who refuse to acquiesce in this trust-right. It would not vary the argument, was that truly the case: But the contrary is apparent from the state of the ranking, as made up and lying in process; from which it appears that there are no less than fourteen other creditors beside the respondent who, rejecting the trust-disposition, have endeavoured to operate their payment by arrestments, partly in the hands of the trustees themselves, partly in the hands of those who were supposed to be debtors to the common debtor.

And as this leads to state more particularly the tenor of that disposition upon which the present question arises, it is material to observe, that, as early as the 14th March 1765, Nathaniel Duke, finding he could no longer keep his head above water without the privity and knowledge of any of his creditors, so far as the respondent knows, at least without calling any general meeting of the creditors to consult and advise with them thereanent, took it upon him to execute a disposition in favours of ten trustees therein named, whereof any five to be a quorum, whereby he disposed to them, for behoof of his creditors, to be named in an inventory or list thereby referred to, the lands and other subjects therein specified; but qualified with so many clauses and reservations, all in his own favours, that it was impossible the creditors, had they been ever so favourably disposed, could have accepted thereof: And so forward was he to establish the same, with a view to tie up the hands of his creditors from proceeding in diligence, that he not only gave it into the register, but caused inscription to be thereon taken the very next day, in name of the trustees, and the inscription to be registered the third day thereafter.

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By the figure and form of this disposition, compleated by infestment, and the infestment registered, Nathaniel Duke was absolutely and irrevocably denuded of the fee of that estate; and so long as it stood unreduced, had no power to execute any new disposition of the same estate. But as in the nature of things, and upon the general principles of law, such disposition could not be effectual without the acceptance of all and each of the creditors for whose behoof it was intended; and as the generality of the creditors, upon notice of the very singular contents of that disposition, did reject the same, and declared their resolution of proceeding to operate their payment, as they best could, by legal diligence: It was to prevent the effect thereof that he bethought himself of executing the other disposition *omnium bonorum*, in favours of the petitioners, as trustees for behoof of his whole creditors, dated the 17th July 1765; and tho' this disposition is, in point of time, some weeks prior to the arrestments used by the respondent, it is posterior to the arrestments used by sundry of the other creditors, who being nearer at hand, and justly alarmed with the prior trust-disposition in March preceding, did proceed to secure their payment by arrestments in the hands of fundries who were supposed to be debtors to the bankrupt; and as these interveening arrestments, between the dates of the first and second dispositions, must undoubtedly be effectual, to the creditors who used these arrestments, to secure their preference and payment, so far as the subjects by them arrested will go, and thereby to withdraw these from the common fund, the respondent must think it an extreme hard case if his arrestments shall be disappointed, and he obliged to accept of the second trust-disposition granted to the now petitioners for behoof of the creditors in general.

Independent of the general objections which lie against such trust-dispositions by bankrupt and insolvent persons, unaccepted of by the creditors, experience has proved how unprofitable

unprofitable and unsalutary they are; that, as all must depend upon the fidelity and diligence of the trustees and those employed under them, the execution of such trusts is for the most part attended with longer delays and greater expence than if the estate were to be brought to a judicial sale; not to mention, that, as decreets of sale, if regularly proceeded in, are the best security the laws of this country can give: Purchasers are thereby encouraged to give a much higher price than they will do where their security is to depend upon voluntary dispositions from the bankrupt and his trustees, against which many latent objections may lie; but which are effectually removed and taken out of the way by the decret of sale.

By this trust-disposition, which proceeds upon a recital of the prior disposition and infestment, and of the creditors refusing to accept of the same, because of the conditions with which it was clogged, he disposes and conveys to the trustees therein named, for behoof of his whole creditors, his whole estate, heritable and moveable, to the end that the said trustees might expose the lands to sale by public roup, either in whole or in parcels; *and after deduction of the necessary expences, and a suitable gratification for their trouble,* to apply the prices towards payment of his whole debts, and the trustees are thereby declared not to be chargeable with omissions in the course of management, and only to be liable for actual intromissions.

It is not incumbent upon the respondent to investigate the management of these trustees in the execution of this trust, or to point out particular acts of mal-administration: It is sufficient for his purpose to say, that the deed is of such a nature, and vested these trustees with such irrational powers, as put it in their power to act as they thought proper, without controul from the creditors, though constitute trustees for their behoof.

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The particular objections which lie against this trust-disposition, supposing it were competent to a bankrupt to compel his creditors to accept of a general surrender in favours of the whole creditors, are these following: 1st, That the disposition is not in favour of the creditors themselves, but of certain other persons as trustees for their behoof. 2^{dly}, That these trustees are of the appointment and nomination of the bankrupt himself, and who it may well be supposed would be such as the bankrupt thought would be most favourable to him. 3^{dly}, That no power is thereby granted to the creditors, was the occasion ever so urgent, or the misconduct of these trustees ever so flagrant to remove them from that trust, and to substitute others in their place. 4^{thly}, that tho' the trustees are directed to expose the lands to sale by public roup, an unlimited power is given to them, without consulting the creditors, to expose them in such lots and parcels, and upon such conditions or articles, as they the trustees should think proper. 5^{thly}, No time is limited within which the subjects should be so exposed to sale; so that the trustees had it in their power to protract and continue their management as long as they should think proper. 6^{thly}, Besides being repaid of the expences of management, each of these trustees, being five in number, supposing them all to accept, are thereby intitled to a suitable gratification for their trouble; the *quantum* of which gratification being undetermined, must either depend upon the pleasure of the trustees, or must involve the creditors in a law-suit to have the *quantum* of that gratification ascertained; and the longer the management was continued before that the whole lands were sold, the moveable effects converted into money, and the debts called in, the gratification to the trustees would be proportionally increased according to the length of time that the trust subsisted. 7^{thly}, And to conclude the whole, all and each of these trustees are excoemed from omissions; so that, had their management

management been ever so negligent and ever so prejudicial to the interest of the creditors, unless direct fraud could be alledged, the creditors are without remeid. Nathaniel Duke might repose what confidence he pleased in these trustees, so far as his own interest went; but, being confessedly so great a bankrupt, that no possible reversion could accrue to him, it did not belong to him to impose these conditions upon his creditors, thereby to compel them to accept of a trust-right so qualified.

The respondent, and other creditors who had used the like arrestments, brought processses of forthcoming; which being conjoined with the processses of multiple-poinning brought in name of the trustees, and others, the Lord Auchinleck Ordinary pronounced his first interlocutor, 24th June, 1767: "Whereby, in respect it is not denied, that
" Nathaniel Duke was bankrupt when he made the trust-
" disposition, found the same could not transfer the pro-
" perty of the bankrupt's effects to the trustees, or entitle
" them to dispose of these effects to any of the bankrupt's
" creditors, to the prejudice of the lawful anterior diligence
" of the respondent; and therefore found the arrestee,
" (i. e. the respondent), preferable both to the trustees and
" to creditors purchasing from them," &c.

And, upon advising a representation for the trustees, with answers for the respondent, his Lordship pronounced this other interlocutor, 9th July 1767: "The Lord Ordinary having considered this representation, with the disposition by Nathaniel Duke to the representers, dated 17th July 1765, which is a disposition *omnium bonorum*, and rendered the disponent bankrupt; and that the disposition was granted to the disponees without true, just, and necessary causes, and without a price really paid, after contracting the debt to Mr Montgomery, who used arrestments of the bankrupt's effects in August said year; adheres to the former interlocutor, so far as it finds the
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“ said disposition does not transfer the property of the
 “ bankrupt’s effects to the trustees in prejudice of the respon-
 “ dent, the disposition being void by law, and he preferable
 “ upon his arrestment.”

From the tenor of these interlocutors, as now submitted to your Lordships review, your Lordships will perceive, that the Lord Ordinary has rested his judgment upon the general principles of law, as established by former decisions of this court, whereby no bankrupt and insolvent debtor, confessing and declaring himself to be such, as implied in every such disposition *omnium bonorum*, has it in his power to compel his creditors to accept of a general surrender in all their favours, and thereby to bind up their hands from acquiring that preference which the law justly decrees to them, according to the priority of their diligence.

And though the respondent cannot doubt, from the authority of the decisions above referred to, that your Lordships will, upon these general principles, be of the same opinion with the Lord Ordinary; yet, if contrary to expectation, any doubt shall occur upon that point, the special objections to this particular disposition, as above stated, will, it is humbly thought, be sufficient to deliver the respondent from being obliged to accept of this trust-right.

The general principles referred to in the Lord Ordinary’s interlocutor are so well known to your Lordships, that it is unnecessary to enlarge upon them; such dispositions are not only gratuitous, in so far as granted without any price or valuable consideration paid therefor, but they are granted without any true, just, or necessary cause, by a professed and declared bankrupt, when reduced to the necessity of making a surrender of all that he has to his creditors.

Every person must see what injustice would in most cases be committed, were the creditors obliged to accept of such dispositions, supposing them to be granted directly in
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their own favours. One or more debts may be in such a situation that immediate diligence may follow upon them, and payment be recovered before that other creditors, whose debts stand suspended for some considerable time, are in condition to compete; one debt may be simple and pure, the other conditional, depending upon future events. In such cases, or others of the like nature, it is just or reasonable, that the bankrupt should have it in his power, by his voluntary act and deed, to impose such a restraint upon those of his creditors who had the means of operating their payment, by following out that course of diligence which the state and condition of their debts, and the law intitled them to, as should disable them to operate their payment, or to subject them to a *pari passu* preference with other creditors, who, in the state and condition of their debts, had not the same means to operate that payment?

But allowing, for argument's sake, that such dispositions *omnium bonorum*, by bankrupt and insolvent persons directly in favours of the creditors themselves, could be justified and supported; it is straining beyond all bounds to extend this to deeds, such as that now in question, not in favours of the creditors themselves, but in favours of trustees of the bankrupt's own nomination and appointment, whereby they must be compelled to rely upon the honesty, fidelity, and diligence of these trustees.

If a person confessedly not bankrupt or insolvent, but who owes a large sum of money to one particular creditor, should take it in his head to execute a trust-disposition of this nature to trustees of his own appointment, to the end that said trustees might sell and dispose of so much of his estate as they should find necessary, and apply the price for payment of that particular creditor; it will not surely be contended, that the creditor would be obliged to accept of such right, or to rest his payment upon the trustees faith-
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ful execution of the trust committed to them; his acceptance of the right is essential and necessary to give it force and efficacy against him; and if, instead of accepting thereof, he chuses to follow out that legal diligence which the law intitles him to, the trust-disposition cannot stand in the way.

And if this principle is just in the case of but one creditor, it must *a fortiori* obtain where the creditors are more in number. They are all unconnected with one another; the bankrupt had it not in his power to create any union between them; each creditor for himself is intitled to accept of or repudiate such right, and the repudiation of any one must vacate the whole; because the disposition is not in favours of, or for behoof of any one creditor, but for behoof of the whole; so that, if the whole do not accept, the disposition must fall *in totum*; because it cannot take effect to the end for which it was granted.

And accordingly Lord Bankton, *Book 1. tit. 10. § 119.* after observing, that, in some former cases, these trust-dispositions had been sustained upon this mistaken principle, That no prejudice was done to any particular creditor by such general dispositions, when equally in favours of all the creditors, he proceeds in these words, referring to the decisions already quoted: " But lately, upon deliberate con-
 " sideration of the case, and the express words of the sta-
 " tute, with the hardships laid upon any one creditor, in
 " restraining him from execution upon his debt by the
 " deed of the bankrupt debtor, the Court of Session found
 " such disposition reducible upon the statute, even tho' no
 " favour was therein shewn to one creditor beyond another,
 " and which they have ever since followed as a rule; so
 " that any of the creditors, without taking notice of such
 " disposition, may proceed in affecting the subject dis-
 " posed, if they have not acceded to the disposition."

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And though the authorities here referred to more immediately relate to dispositions by notour bankrupts, in terms of the statute 1696, as that was but an extension of the former regulations established by the statute 1621, both depending upon the same general principles of law and justice; and as none can be a more notorious bankrupt than he who declares himself such by the very tenor of that right which he grants, without any true, just, or necessary cause, under the specious but false pretence of doing equal justice to his whole creditors, when, in effect, he does manifest injustice to those who, from the state and condition of their particular debts, and by the diligence of the law, have it in their power to operate their payment. It is impossible, that it should be in the power of such bankrupt, by his voluntary act and deed, to bind up the hands of all or any of his creditors, or to oblige them to accept of a general disposition in all their favours equally, *esto* the disposition had been directly in their favours.

But, that he should impose trustees upon them, to have the management and disposal of his estate, and that too with such irrational powers as are granted by the deed in question, surpasses all comprehension.

The petitioners are pleased to say, That if the generality of the creditors had not acquiesced in this trust-right, those of them that were nearer at hand would have had it in their power to have used arrestments of an earlier date than the respondents; and that their forbearing so to do, in the belief and expectation that the whole creditors would acquiesce in that trust-right, ought not to benefit the respondent.

But as your Lordships have already heard, that a number of creditors, alarmed by the first trust-disposition, did proceed in separate measures, and, by their arrestments, have attached sundry of the effects; as this was a sufficient

cient warning to the other creditors, who, by their connections with the bankrupt, were more favourably disposed towards him, if they suffer, by forbearing to use the like diligence, in hopes of being able to support the trust-right to its full extent, they have themselves only to blame; and the respondent can with no reason be denied the effect of his arrestment, when other creditors, by the like arrestments, have secured their payment in whole or in part.

In respect whereof, &c.

ALEX. LOCKHART.

